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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-7421

First American Bank & Trust Company; Robert M. Hart, Robert N. Campbell, and Larry Sanders, Officers and Directors; Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, and Charles L. Welch, Directors;

Petitioners,

vs.

G.W. Ellwein, Commissioner, State Examiner, and Chairman of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; Ralph L. Trom, W. S. Raymond, James H. Duncan, Donald T. Nicklawsky, and John Rouzie, members of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; Robert E. Keim, Assistant Commissioner, Deputy Examiner, and Secretary of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; and Victor Abraham, Manley Malmstad, and Donald Anderson, as officers of the Department of Banking and Financial Institutions of the State of North Dakota; and the State Banking Board of the State of North Dakota;

Respondents.

Petition For Writ of Certiorari To The
United States Circuit Court of Appeals
For The Eighth circuit

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. _____

First American Bank & Trust Company; Robert M. Hart, Robert N. Campbell, and Larry Sanders, Officers and Directors; Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, and Charles L. Welch, Directors;

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G.W. Ellwein, Commissioner, State Examiner, and Chairman of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; Ralph L. Trom, W. S. Raymond, James H. Duncan, Donald T. Nicklawsky, and John Rouzie, members of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; Robert E. Keim, Assistant Commissioner, Deputy Examiner, and Secretary of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; and Victor Abraham, Manley Malmstad, and Donald Anderson, as officers of the Department of Banking and Financial Institutions of the State of North Dakota; and the State Banking Board of the State of North Dakota;

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Bismarck, N. Dak. 58501

Counsel for Petitioners

Petitioners, hereinafter referred to as FAB, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit affirming the judgment of the District Court, and a denial of Petitioners' Suggestion for Rehearing In Banc and Petition for Rehearing by the Court of Appeals, all of which dismissed the complaint of the Petitioners for want of a federal constitutional question on the grounds that the Petitioners had freely and without reservation submitted their federal constitutional claims to the courts of the State of North Dakota for decision by those courts and the same have been litigated and decided by said courts. (Memorandum and Order of Dismissal, Appendix 1; Judgment of Denial, Appendix 11)

JURISDICTION

Jurisdiction of this Court is sought and invoked on the grounds that the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court.

The date of the Appellate Court's judgment is July 30, 1975 and was entered on the same date. (Appendix 14)

The order denying Petitioners' Suggestion for Rehearing In Banc and Petition for Rehearing was entered on August 21, 1975. (Appendix 20)

The statutory authority to confer jurisdiction on this Court to review such judgment by Writ of Certiorari is 28 U.S.C. 1254 (1).

QUESTION PRESENTED FOR REVIEW

Can Petitioners be said to have fully, freely, and without reservation presented, argued, and briefed their federal constitutional questions of due process and equal protection of the law in the state courts when their actions, arguments, and briefs were specifically pursuant to the statute and constitution of the state; and when the state, neither in its administrative agency nor judicial proceedings, had any basis in rules, regulations or minimum elements of due process by which to determine Petitioners' actions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." **Section 1, Fourteenth Amendment to the United States Constitution.**

"In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, **nor be**

deprived of life, liberty or property without due process of law." Section 13, Constitution of North Dakota. (Emphasis added)

"All courts shall be open, and **every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered** without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by Law, direct." **Section 22, Constitution of North Dakota.** (Emphasis added)

"28-32-19. Scope of and procedure on appeal from determination of administrative agency. The court shall try and hear an appeal from the determination of an administrative agency without a jury and the evidence considered by the court shall be confined to the record filed with the court. If additional testimony is taken by the administrative agency or if additional findings of fact, conclusions of law, or a new decision shall be filed pursuant to section 28-32-18, such evidence, findings, conclusions, and decision shall constitute a part of the record filed with the court. After such hearing, the court shall affirm the decision of the agency unless it shall find that such decision or determination is not in accordance with law, or that it is in violation of the constitutional rights of the appellant, or that any of the provisions of this chapter have not been complied with in the proceedings before the agency, or that the rules or procedure of the agency, or afforded the appellant a fair hearing, or that

the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact. If the decision of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the decision of the court. **North Dakota Century Code.**

"The district court still has original jurisdiction of any civil action authorized by law to be commenced by any person: (3) To redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing equal rights of citizens or of all persons within the jurisdiction of the United States;". **28 U.S.C. 1843 (3).**

"Hence, any person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." **42 U.S.C. 1983.**

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the

enforcement or execution of such statute or of an order made by an administrative board or commission acting under state statute, shall not be granted by any district court or judge thereof upon the grounds of the unconstitutionality of such statutes unless the application therefor is heard and determined by the district court of three judges under Section 2284 of this Title." 28 U.S.C. 2281.

28 U.S.C. 2284. (Printed in Appendix)

STATEMENT OF THE CASE

Petitioners (FAB) brought this action in the district court, on a return to the Federal Court after abstention pending state court decisions, on the question of due process of law afforded Petitioners by a state administrative agency under the state constitution. (**FAB v. Ellwein**, 474 F. 2d 933 (C. A. 1973). A final determination by the Supreme Court of North Dakota (Appendix 24) and Denial of Petition for Writ of Certiorari by this Court (Appendix 23).

After the initial granting of a temporary restraining order by the district court, the defendants made a motion for dismissal on the grounds of no federal constitutional question and that the Petitioners had fully presented their constitutional question to the state courts. The matter proceeded to a three-judge court and defendants' motion was granted, without inquiry into the merits of the Petitioners' complaint.

In the state proceedings, Petitioners had confronted the administrative agency with its bias, prejudice, prejudgment, adverse and competitive business interests, and its adversary position as defendants in

legal proceedings brought by Petitioners, pending in the state courts, to show that the Petitioners, could not be afforded due process nor equal protection of the laws, on a hearing before said administrative agency. The state district court, on appeal from an adverse determination by the administrative agency, reversed the administrative agency and held for the Petitioners on the question of due process and equal protection of the laws. In the appeal from the administrative agency's adverse decision to the state district court, Petitioners specifically set forth that they were proceeding under the state statute providing for a review of such administrative agency's action, pursuant to 28-32-19 of the North Dakota Century Code. (Appendix 24)

On appeal from the state district court's decision in favor of Petitioners, the Supreme Court of the State of North Dakota reversed the state district court and in its opinion acknowledged the abstention of the Federal Court pending the determination by the state courts. (Appendix 28)

From this record the Eighth Circuit Court of Appeals affirmed the three-judge court dismissal of Petitioners' complaint on the grounds that Petitioners had fully and freely and without reservation presented their federal questions to the state courts for determination.

The Federal District Court jurisdiction is invoked under 28 U.S.C. 1343 (3), 42 U.S.C. 1983, and 42 U.S.C. 1981.

REASON FOR GRANTING WRIT

The appellate court has decided a federal question in a way that conflicts with applicable decisions of this Court in an issue involving an exercise of power, under

color of state law, by an administrative agency of the state, to destroy the rights of persons to engage in a financial business in competition with established banks and savings and loan institutions that could cause a serious competitive market for such other institutions in the State of North Dakota and, in fact, for such banking and savings and loan institutions throughout the United States. The competitive business established by the Petitioners herein would have afforded the people of North Dakota and throughout the United States an opportunity to realize a higher return on their savings and investments than permitted under state law for banking associations and under the regulation of the Federal Reserve Board for national banks.

In following the dictates of **England, et al, v. Louisiana State Board of Medical Examiners, et al,** 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (Jan. 1964), the Petitioners did not fully, freely, and without reservation present, argue, nor brief their federal questions to the state courts! This position is amply borne out by the record and has been ignored by the lower courts.

There are no magic nor specific words, **Commonwealth Ex Rel Specter v. Levin,** 359 F. Supp. 12, 13-15, required to denote such reservation. If this Court is to require such, then should it set forth such requirement, which might be in furtherance of its legislative enactment for such requirement in the first instance, so that some humble and reticent statement could be used without being an affront to all state courts in the country? It is one thing for this Court to make such a requirement and quite another for a lawyer to incur the wrath of a state court by stating that it makes no difference what action it takes because the matter will be taken before the federal

courts anyway. In fact, what happens in such instances, as in this case, FAB v. Ellwein, the state court wiggled its way through its opinion without being definitive on the constitutional questions, state or federal.

Persons, including Petitioners, have established rights under both STATE AND FEDERAL statutes and constitutions. "Due process" is protected and guaranteed under both jurisdictions. How then, when Petitioners exercise their rights specifically under STATE statutes and constitution, can they be said to have abandoned, waived or given up their rights under the FEDERAL authority? (Appendix 24)

The Petitioners acted pursuant to **England v. Louisiana State Board of Medical Examiners, et al,** 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461, in a way so as not to incur such wrath nor be an affront to the state court, by stating that their proceedings were being made specifically pursuant to state law. (Appendix 24)

As stated in **Commonwealth, supra:**
"We need not be concerned with the manner or formality by which a federal question may be 'reserved' from state court decision."

Thus the Petitioners' right to return to the Federal Court has been preserved, making effective "the primacy of the federal judiciary in deciding question of federal law" (England, **supra,** pages 415-416).

In the initial order of January 27, 1975, Judge VanSickle correctly states the federal law with respect to a substantial constitutional question and federal issue being presented by the Petitioners' complaint and his position is fortified by the recent case of **Withrow v.**

Larkin, -U.S.-, 43 L. Ed. 2d 712, 95 S. Ct. - , where the court stated at page 464, when dealing with the question of those who have investigated and then have adjudicated the issue when so presented:

"The issue is substantial."

And further, in Withrow, **supra**, this Court stated at page 730:

> "Clearly, if the initial view of the facts based on the evidence derived from non-adversarial process as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised . . . That the combination of investigative and adjudicatory functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances presented in the case before it that the risk of unfairness is intolerably high."

Allowing a decisionmaker to review and evaluate their own prior decisions raises problems, citing **Gagnon v. Scarpelli**, 411 U.S. 778; **Morrissey v. Brewer**, 408 U.S. 471; and **Goldberg v. Kelly**, 397 U.S. 254, 271.

In this case there is no basis in fact or record for the holding that Petitioners freely, fully, and without reservation presented, argued, and briefed their federal issues to the state courts!

This could not be done! The State Supreme Court held:

(FAB v. Ellwein, **supra**, Appendix 34) "While recognizing that the adjudicative function of the board is quasi-judicial in nature, we have never held that the **minimal due process** that must be afforded participants before an administrative board or agency is synonymous with minimal requirements of due process in a court of law . . ." (Appendix 34) and ". . . **we concluded that there must be an absence of one of the elements deemed essential to due process of law without specifically enumerating what those essential elements are.**" (Emphasis added)

The irony of being judged by the failure of the state to establish minimum elements of due process, by legislative enactment or judicial fiat, is being judged in the first instance by the administrative agency which had no rules or regulations for governing the activities of those within its jurisdiction!

Petitioners are now said to have presented, argued, and briefed their federal questions, when those federal questions could not have been determined according to any state rule, regulation, statute nor court adjudication! **Where is the record of such activity on the part of the Petitioners?**

Further, Petitioners have been denied equal protection of the laws, when there were no laws on which to base such equality. Findings of the administrative agency were necessarily arbitrary, and discriminatory as was the opinion of the North Dakota Supreme Court.

CONCLUSION

The Supreme Court of the United States should grant this petition so that the rights guaranteed to Petitioners by the Constitution of the United States, under the Fourteenth Amendment, and the laws of the United States will correct the inequity practiced against these Petitioners and their persons and property protected!

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Counsel for Petitioners

APPENDIX

A1

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA SOUTHWESTERN DIVISION

First American Bank & Trust Company; Robert M. Hart, Robert N. Campbell, and Larry Sanders, Officers and Directors; Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, and Charles L. Welch, Directors;	)	
Plaintiffs,	)	
vs.	)	A1-75-2
G. W. Ellwein, Commissioner, State Examiner, and Chairman of the State Banking Board, Department of Banking and Financial Institution of the State of North Dakota; Ralph L. Trom, W. S. Raymond, James H. Duncan, Donald T. Nicklawsky, and John Rouzie, member of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; Victor Abraham, Manley Malmstad, and Donald Anderson, as officers of the Department of Banking and Financial Institutions of the State of North Dakota; the State Banking Board of the State of North Dakota; and Harry George,	)	
Defendants.	)	

Before The Honorable MYRON H. BRIGHT, Circuit Judge, PAUL BENSON, Chief District Judge, and BRUCE M. VAN SICKLE, District Judge.

PER CURIAM:

MEMORANDUM and ORDER OF DISMISSAL

The Plaintiffs seek a judgment declaring unconstitutional the statutory authority for the North Dakota State Banking Board, N.D.C.C. SS6-01-01,-03,-09 (1959 and Supp. 1973), or the exercise of that authority by the Board, and permanently enjoining the Board from enforcing any actions taken pursuant to this authority.

The Plaintiff, First American Bank & Trust Company (FAB), a North Dakota corporation, filed its complaint in the United States District Court for the District of North Dakota on January 17, 1975. The Court granted on the same day its motion for a temporary restrining order against the Defendants, state officials entrusted with the execution of North Dakota's banking laws. The Defendants then moved to dismiss the complaint and dissolve the temporary restraining order. On January 27, 1975, the Court denied the motion, and Defendants appealed to the United States Court of Appeals for the Eighth Circuit, seeking to have the restraining order, which had by then become a preliminary injunction, suspended and stayed. On February 4, 1975, the Chief Judge of the Court of Appeals convened a Three-Judge Court to hear FAB's complaint, pursuant to 28 U.S.C. S2284. The Court of Appeals, by order of February 6, 1975, set aside the District Court's denial of the motion and recommended that the motion be promptly referred to the three-judge panel.

FAB has previously presented in Federal Court a similar challenge to the constitutionality of the Banking Board. In **First American Bank & Trust Co. v. Ellwein**, 474 F. 2d 933 (8th Cir. 1973), the Court of Appeals abstained from deciding the constitutional issue because of the possibility that the State Courts of North Dakota might rule favorably to FAB in a pending review of the Board's action. **Id.** at 935.

Thereafter, the State District Court held that the Board action was unconstitutional as a denial of due process. **First American Bank & Trust Co. v. Ellwein**, Civil No. 22281 (N.D. Dist. Ct., County of Burleigh, Aug. 27, 1973). The State Supreme Court reversed, holding that the Board, either as constituted or by its action, did not deny FAB due process of law. **First American Bank & Trust Co. v. Ellwein**, 221 N.W. 2d 509 (N.D. 1974). The United States Supreme Court denied FAB's petition for certiorari. 95 S. Ct. 505 (1974). Thereupon, FAB filed the present complaint.

The record in this case demonstrates that the constitutionality, under the Fourteenth Amendment, of the Board's conduct in ruling that FAB is insolvent and appointing a receiver has been fully presented to the State Courts. Before the Board, the State District Court, the State Supreme Court, and its application for certiorari, FAB urged successively that the composition and proceedings of the Board denied it procedural due process. Plaintiff relies primarily upon **Gibson v. Berryhill**, 411 U.S. 564 (1973), to support its contention of denial of due process.

In its petition for certiorari FAB acknowledged that it has raised the constitutionality of the Board's composition and procedure at every stage of the state administrative and judicial proceedings:

> Constitutional and due process questions (were) first raised in written response to Complaint of State Banking Board and its Notice of Hearing . . .; secondly, in opening statements at time of purported "hearing", June 19, 1972 . . .; thirdly, on appeal to the State District Court . . .; and lastly, to State Supreme Court in Petitioners' (Appellees) Brief and Petition for Rehearing . . . (Petition

for Writ of Certiorari at 14, **First American Bank & Trust Co. v. Ellwein**, No. 74-187 (U.S. S. Ct.) 1.

FAB, however, contends that it is entitled to relitigate this issue in the Federal Courts because, following abstention by the Federal Court of Appeals in **First American Bank v. Ellwein**, supra, 474 F. 2d at 835-36, and prior to submission of the controversy to the State Courts, it reserved the federal constitutional issue for determination by the Federal Courts, as authorized in **England v. Louisiana State Board of Medical Examiners**, 375 U.S. 411, 415-22 (1964).

Under the holding of **England**, such a reservation by FAB would enable it to renew its constitutional challenge in Federal Court following submission of state issues to the State Courts. The record refutes FAB's contention that it reserved the federal constitutional issue from consideration by the State Courts. Relying upon federal case law, the State courts thoroughly examined the issue and, ultimately, upheld the Board's constitutionality. Under these circumstances, FAB is bound by the State Court determination of the constitutional issue and has no right to relitigate the issue in the Federal Court. It bypassed the procedure announced in **England** and therefore gains no support from that decision. **Res judicata** bars it from raising the issue before this Court. See **Fisher v. Civil Service Commission**, 484 F. 2d 1099, 1100-01 (10th Cir. 1973); see also, e.g., **Thistlethwaite v. City of New York**, 497 F. 2d 339, 341-42 (2d Cir.), cert. denied, _____ U.S. _____, 95 S. Ct. 686 (1974); **Commonwealth ex rel, Specter v. Levin**, 359 F. Supp. 12, 13-15 (E.D. Pa. 1973) (Three-Judge Court).

At oral argument FAB proposed an alternative ground in justification of presenting its due process

contention to this Court. FAB contends that it could not litigate in the State Court a charge that each of the members of the Banking Board possessed a personal bias and prejudice against it, separate from the bias of the Board generally. It apparently bases this contention on the assumption that it could not raise the issue of personal bias before the Board and therefore could not raise the issue on judicial review in the State Courts.

A review of the record reveals, however, that FAB did indeed assert a claim before the Board of actual bias and prejudgment by its members. At the initial proceeding before the Board, FAB made the following statements:

> We would ask, Mr. Chairman, that the Board recognize that the respondents or defendants are making a special appearance this morning and that we have asked this Board, in view of its previous findings, affidavits, public releases, correspondence concerning these people, that it dissolve itself until a new Board is appointed by which these people may have a fair and unbiased hearing according to due process of law and under the equal protection of the law.
>
> ***
>
> And on the further ground, Mr. Chairman, from the statements of the chairman, it is evidence not in the record that these people do not have a representative on this Board; that the members of the Board are adversaries in business, that they are defendants in lawsuits between the parties, that there have been filed and as a matter of

> record under the affidavits of the chairman, prejudgments in this matter, purportedly by the chairman and by the Board, which prejudgments and the manner in which they have been conducted, have been declared unlawful by the Supreme Court of North Dakota.

FAB asserts, however, that it could not, for practical reasons, present adverse evidence against each of the Board members in the administrative hearing. This argument lacks merit, especially in view of the state statutory authorization of supplementation of an administrative record on an appeal to the District Court on such terms and conditions as the Court may deem proper.[1]

> [1] 28-32-18. Consideration of additional or excluded evidence. — If an application for leave to adduce additional evidence is made to the court in which an appeal from a determination of an administrative agency is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the administrative agency, or that such evidence is material to the issues involved and was rejected or excluded by the agency, the court may order that such additional evidence be taken, heard, and considered by such agency on such terms and conditions as the court may deem proper. After considering such additional evidence, the administrative agency may amend or modify its findings of fact, conclusions of law, and decision, and shall file with the court a transcript of such additional

evidence together with its new or modified findings of fact, conclusions of law, and decision, if any.

28-32-19. Scope of and procedure on appeal from determination of administrative agency. — The court shall try and hear an appeal from the determination of an administrative agency without a jury and the evidence considered by the court shall be confined to the record filed with the court. If additional testimony is taken by the administrative agency or if additional findings of fact, conclusions of law, or a new decision shall be filed pursuant to section 23-32-18, such evidence, findings, conclusions, and decision shall constitute a part of the record filed with the court. After such hearing, the court shall affirm the decision of the agency unless it shall find that such decision or determination is not in accordance with law, or that it is in violation of the constitutional rights of the appellant, or that any of the provisions of this chapter have not been complied with in the proceedings before the agency, or that the rules of procedure of the agency have not afforded the appellant a fair hearing, or that the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact. If the decision of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the decision of the court. (N.D.C.C. §§ 28-32-18 & 19 (1960)).

In any event, we deem it beyond dispute that the State Courts considered the question of individual bias. The District Court's opinion contains the following statement:

> The Court has already expounded at some length on the subject of the existence of bias, interest, and prejudgment on the part of the Board and **its individual members**, and the lack of due process in conducting the hearing before the Board, This adds up to a violation of the constitutional rights of the appellants. (**First American Bank & Trust Co. v. Ellwein**, Civil No. 22281 (Aug. 27, 1973) (emphasis added)).

The State Supreme Court was also cognizant of charges of individual bias:

> FAB says, in a colorful display of verbiage, the hearing that was held was designed in the great tradition of the Old West to be a fair trial before the hanging. The Board had already been deeply embroiled in efforts to declare FAB insolvent. The State Examiner is chairman of that Board. These efforts took the form of various legal actions in Federal and State Courts as previously referred to. It is apparent that counsel for the Board took an active part in cooperating and exchanging information with the SEC, which, in turn, presumably resulted in their entry into the fray. After these efforts were unsuccessful they turned to an administrative hearing. The State Examiner had, to some extent, determined the condition of the Bank by the issuance of his prior orders. Mr. Frank F. Jestrab, as attorney for the Board, filed a

> complaint against FAB. He represented the Board in all the litigation. The Boared approved the report of insolvency by its examiner prior to the hearing. This is not to say the findings are incorrect. The correctness of the findings does not make the hearing fair. Due process of law presupposes a fair and impartial hearing before a fair and impartial tribunal. The board hearing the case should be a qualified board without prejudice and strictly impartial as to the issues to be tried. (221 N.W. 2d 509, 513).

We therefore reject Plaintiffs' attempt to raise the question of personal bias as a new and previously unconsidered ground for review of the constitutionality of the Board's conduct.

Moreover, even if that facet of the due process question had not been previously litigated, principles of **res judicata** bar the claim, since this issue represents a ground for relief within the same cause of action asserted in State Court. See S63, **Restatement of Judgments.**

Litigation must come to an end at some point. FAB has exhausted all available avenues of relief from what it views as the Board's unconstitutional composition and conduct. It must now abide by the Board's order declaring it insolvent and appointing a receiver. The motion to dismiss is **granted.**

Counsel for the Defendants will forthwith prepare and submit an appropriate form of judgment.

Dated this 27 day of February, 1975.

/s/ Myron H. Bright
MYRON H. BRIGHT
United States Circuit Judge

/s/ Paul Benson
PAUL BENSON, Chief Judge
United States District Court

/s/Bruce M. Van Sickle
BRUCE M. VAN SICKLE, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

First American Bank & Trust Company; Robert M. Hart, Robert N. Campbell, and Larry Sanders, Officers and Directors; Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, and Charles L. Welch, Directors;

Plaintiffs-Appellees,

vs.

G. W. Ellwein, Commissioner, State Examiner, and Chairman of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; Ralph L. Trom, W. S. Raymond, James H. Duncan, Donald T. Nicklawsky, and John Rouzie, members of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; Robert E. Keim, Assistant Commissioner, Deputy Examiner; and Secretary of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota; and Victor Abraham, Manley Malmstad, and Donald Anderson, as officers of the Department of Banking and Financial Institutions of the State of North Dakota; and the State Banking Board of the State of North Dakota;

Defendants-Appellants.

JUDGMENT OF DISMISSAL

Civil No. A1-75-2

This cause came on to be heard before this three-judge court on Defendant's Motion to Dismiss the action upon the ground of a lack of substantial federal constitutional question for decision by this court and the court having granted the Motion, it is hereby

ORDERED, ADJUDGED and DECREED that the action be and hereby is dismissed **for want of a substantial federal constitutional question** for this court, **Plaintiff having freely and without reservation** submitted their federal constitutional claims to the courts of the state of North Dakota for decision by the courts of the state of North Dakota and the same having been litigated and decided by said courts of North Dakota.

Dated this 6th day of March, 1975.

/s/ Bruce M. Van Sickle
BRUCE M. VAN SICKLE
Judge, United States District Court

United States of America)
)ss:
—District of North Dakota)

I, Cletus J. Schmidt, Clerk of the United States District Court for the _____ District of North Dakota, do hereby certify that the annexed and foregoing is a true and full copy of the original JUDGMENT OF DISMISSAL, Filed March 6, 1975 in Civil Case No. A1-75-2 - First American Bank & Trust Company, et al v. G. W. Ellwein, Commissioner,

State Examiner, and Chairman of the State Banking Board, Department of Banking and Financial Institutions of the State of North Dakota, et al.

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Bismarck, North Dakota this 6th day of March, A.D. 1975.

CLETUS J. SCHMIDT
Clerk.

By /s/ Vivian Sprynczynatyk
Chief *Deputy Clerk.*

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1197

First American Bank & Trust Company, et al.,	*	
Appellants,	*	
v.	*	Appeal from Judgment of Dismissal of Three Judge Court.
G. W. Ellwein, Commissioner, etc., et al.,	*	
Appellees.	*	

Submitted: June 10, 1975
Filed: July 30, 1975

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and HEANEY, Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

Plaintiff, First American Bank and Trust Company (FAB), a North Dakota corporation, has taken a timely appeal from final order of a three-judge district court dismissing its complaint upon the basis of res judicata by reason of plaintiff's prior litigation in North Dakota state courts of the federal constitutional questions raised. The issue on appeal is whether the court erred in dismissing the action on the ground

that appellant had previously presented and litigated its constitutional claims in the state courts, thereby electing to forego its right to return to the federal district court. We agree with the three-judge court that FAB presented and the state courts considered the constitutional questions raised. Accordingly, we affirm.

Plaintiff has been a litigant in this and related cases in the North Dakota state courts and federal courts, including this court, for nearly five years. We will not attempt to detail the history of litigation but merely summarize the facts pertinent to the instant appeal. For a detailed history of the case, see **First American Bank & Trust Co. v. Ellwein**, 221 N.W. 2d 509 (N.D. 1974).

In May 1972 the North Dakota State Banking Board notified FAB that a hearing would be held, commencing June 19, 1972, to determine whether FAB should be allowed to continue doing business in North Dakota in view of alleged questionable banking practices which allegedly resulted in FAB's insolvency. FAB promptly instituted an action in the federal district court seeking injunctive and other relief against the Board to prevent the Board from holding a hearing and making findings concerning FAB's solvency and banking practices. This court, in **First American Bank & Trust Co. v. Ellwein**, 474 F. 2d 933 (8th Cir. 1973), affirmed the district court's denial of injunctive relief on the grounds that federal abstention was appropriate. At the time of oral argument in that case the Board had already held the hearing of June 19, 1972, and an appeal was pending in the District Court for Burleigh County in North Dakota.[2] The Board, on December 12, 1972, had ordered a receiver appointed to liquidate FAB on the basis of insolvency. At the hearing before the Board

FAB's counsel made a "special appearance" challenging the makeup of the Board because of bias and conflicts of interest.[3] The North Dakota State District Court found that FAB was not afforded a fair hearing on constitutional (due process) grounds by reason of pre-judgment bias and conflicts of interest. The North Dakota Supreme Court reversed the district court, holding that FAB was not denied a fair hearing before the Board and stating " (w) e do not think the statutory scheme of (banking) regulation is unconstitutional." "**First American Bank & Trust Co. v. Ellwein**, 221 N.W. 2d 509, 512 (N.D. 1974), The United States Supreme Court subsequently denied FAB's petition for certiorari. 419 U.S. 1026 (1974). Thereafter, on January 17, 1975, FAB filed the complaint now before us in the United States District Court for the District of North Dakota.

FAB's complaint sought preliminary and permanent injunctive relief and a declaration of unconstitutionality of the North Dakota statutory scheme under which the State Banking Board exercised its authority.[4] Such statutes are challenged on their face as well as applied to FAB. Preliminary injunctive relief against defendants was granted by the district court in the form of a temporary restraining order enjoining the defendants from enforcing the mandate of the North Dakota courts. A three-judge court was promptly convened to hear FAB's constitutional attack on the state statutes in question. In an opinion by Judge Bright, reported as **First American Bank & Trust Co. v. Ellwein**, _____ F. Supp. _____ (D.N.D. 1975), the three-judge court held that FAB was barred from litigating the constitutional questions raised on res judicata grounds because "the constitutionality, under the Fourteenth Amendment, of the Board's conduct in ruling that FAB is insolvent and appointing a receiver has been

fully presented to the State Courts." _____ F. Supp. at _____.

We agree with Judge Bright's well-reasoned opinion and hold that FAB is barred by res judicata from relitigating its constitutional attack, facially and well as applied, on North Dakota's State Banking Board makeup and procedure. **See Lecci v. Cahn**, 493 F. 2d 826, 829-830 (2d Cir. 1974); **Fisher v. Civil Service Comm'n**, 484 F. 2d 1099 (10th Cir. 1973).

FAB's primary contention on appeal is that it reserved the federal constitutional issues originally raised in the federal district court following absention by this court as authorized in **England v. Louisiana State Board of Medical Examiners**, 375 U.S. 411, 415-422 (1964). Such reservation allows a party to renew constitutional challenges in federal court following a determination by the state court of state issues. However, our search of the record reveals no attempt whatsoever by FAB to expressly reserve its federal constitutional questions in the North Dakota state courts. The reported opinions clearly indicate that FAB has presented its constitutional questions to the state courts. **First American Bank & Trust Co. v. Ellwein**, 474 F. 2d at 935 n. 4; **First American Bank & Trust Co. v. Ellwein**, 221 N.W. 2d at 512, 515. Indeed, in FAB's Petition for Writ of Certiorari in the United States Supreme Court, which is part of the record here, it stated:

> Constitutional and due process questions (were) first raised in written response to Complaint of State Banking Board and its Notice of Hearing . . .; secondly, in opening statement at time of purported "hearing", June 19, 1972 . . .; thirdly, on appeal to the State District Court . . .; and lastly to State

> Supreme Court in Petitioners' (Appellees) Brief and Petition for Rehearing . . . (Petition for Writ of Certiorari at 14, **First American Bank & Trust Company v. Ellwein**, No. 74-187 (U.S. S. Ct.)) 1.

There is no doubt that FAB has clearly and voluntarily presented its constitutional claims to the North Dakota state courts and those claims have been decided adverse to it.

We recognize that an express reservation of constitutional questions need not be made to invoke the judge-made rule in **England**. A litigant may return to federal court with his federal constitutional questions without an express reservation "unless it clearly appears that he . . . fully litigated his federal claims in the state courts." 411 U.S. at 421. Nonetheless, the record is strong that FAB vigorously presented the federal constitutional questions here raised at each and every proceeding in the state courts. FAB has failed to bring itself within the rule announced in **England v. Louisiana State Board of Medical Examiners, supra**, and has thus forfeited its right to litigate its constitutional claims in federal court.

The judgment of the district court dismissing FAB's complaint on res judicata grounds is affirmed. Any restraining or injunctive orders that may still be in effect are dissolved and vacated.

A true copy.
Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[1] In **MTM, Inc. v. Baxley**, 43 U.S.L.W. 4442 (U.S. March 25, 1975) the Supreme Court held that an appeal from an order of a three-judge federal court under 28 U.S.C. § 1253 is properly presented to the courts of appeal where such order does not consider the merits of the constitutional claim raised. **See Gonzales v. Automatic Employees Credit Union**, 43 U.S.L.W. 4025 (U.S. Dec. 10, 1974). Because FAB's complaint was dismissed and the merits not reached, its appeal is thus properly before us.

[2] North Dakota permits appeals from administrative agencies to state courts of general jurisdiction. 5 N.D. Cent. Code SS 28-32-15 and 28-32-21.

[3] The members of the North Dakota State Banking Board are private bankers allegedly in direct competition with FAB.

[4] Statutes specifically challenged are North Dakota Cent. Code SS 6-01--01, 6-01-03, and 6-01-09. Jurisdiction in the federal court was invoked under 28 U.S.C. SS 1343, 2201, 2202 and 2284 and 28 U.S.C. SS 1981 and 1983.

[5] FAB has dealt extensively in its Brief with the merits of its constitutional claim. Our affirmation of the three-judge court's decision that the action was properly dismissed on the basis of res judicata precludes a review of the merits of plaintiff's claim.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1197

September Term, 1974

First American Bank & Trust Company etc., et al, *Appellants,* vs. G. W. Ellwein, Commissioner, State Examiner, etc., et al, *Appellees.*	Appeal from the United States District Court for the District of North Dakota

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

August 21, 1975

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat, 968; June 11, 1960, Pub. L. 86-507, §1 (19), 74 Stat. 201.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

Frederick E. Saefke, Jr., Esq.
411 North Fourth St.
P.O. Box 1874
Bismarck, N.D. 58501

RE: FIRST AMERICAN BANK & TRUST CO., ET AL. v. ELLWEIN, ETC., ET AL., 74-187

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case. Mr. Justice Douglas would grant certiorari.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By

/s/ Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

Frank F. Jestrab, Esq.
Spec. Asst. Attorney General of North Dakota
111 East Broadway P.O. Box 1526
Williston, N.D. 58801

This is what the Plaintiffs have contended all the way through this matter, i.e., their findings of fact were, in fact, conclusions without any substance or support. Practically speaking, all that can be said for this repetition is that it is a good way to build up fee and costs.

We want no misunderstanding that our ceasing to continue this bantering and not replying individually to each of the paragraphs in the Defendants' brief is to be considered an agreement or conceding in any manner whatsoever that any statement therein is true, but to the contrary.

CONCLUSION

The Plaintiffs have taken this appeal from the action of the State Banking Board pursuant to 28-32-19 N.D.C.C., and have specified the grounds for such appeal pursuant to said statute.

Even though the Defendants herein purport to base their claims against First American on the grounds of "insolvency" they deal with that question only in sketches and ramble on in other manners and forms to raise suspicion and doubt, to cloud the issue for the purpose of destroying this business and its personnel.

In dealing with this question of solvency, the Plaintiffs have not had a fair trial pursuant

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer,

Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellees

v.

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham Bank Examiner, all of the State of North Dakota,

Appellants

Civil No. 8967

(Filed June 28, 1974)

1. The statutory scheme for the regulation of banks is constitutional.

2. Due process of law presupposes a fair and impartial hearing before a fair and impartial tribunal.

3. An administrative board is not a judicial tribunal and due process does not require a judicial trial; the combination of investigative, accusative, and adjudicative functions in one board is not, of itself, a denial of due process.

4. A presumption exists that the Board's official duty was regularly performed.

5. The Rule of Necessity, whereby otherwise disqualified officers may serve if there is not other tribunal, is applicable to State administrative agencies.

6. It is not a violation of due process to sit on a case after an officer expresses his opinion that certain types of conduct are prohibited by law.

7. The fundamental requirement of due process is opportunity to be heard.

8. Substantial evidence to support the findings of an administrative board will cause this court to affirm that board's orders.

(Syllabus by the Court)

'Appeal from the District Court of Burleigh County, the Honorable M. C. Fredricks, Judge.

JUDGMENT REVERSED.

Opinion of the Court by O'Keefe, D. J.

Frederick E. Saefke, Jr., Box 1874; Lundberg & Nodland, Box 1675, Bismarck, for Appellees.

Allen I. Olson, Attorney General, Bismarck; Frank F. Jestrab and John R. Gordon, Special Assistant Attorneys General, Box 1526, Williston, for Appellants.

Civil No. 8967

First American Bank & Trust Company

v.

Ellwein

O'Keefe, D.J.

This case has a long, entangled past. There will be

no attempt to summarize in detail all of the various forms of litigation and hearings. We will sketch a broad outline that will assist in understanding this opinion. The prior procedures are a maze of false starts, personal attacks, unbelievable allegations, and a series of appeals. We view this case in that context. The central fact is that the State Banking Board (hereinafter referred to as the "Board") has undertaken a massive administrative and legal effort to close down the operations of First American Bank & Trust Company, a Bismarck corporation (hereinafter referred to as "FAB").

The immediate case is an appeal from the findings of the Board on December 12, 1972, ordering a receiver be appointed to liquidate FAB on the basis of insolvency. The administrative hearing leading to this order began on June 19, 1972, continued through June 29, 1972, and resumed again for two days in September. The transcript from such hearing is literally voluminous. The Honorable M. C. Fredricks, District Judge, reversed the decision of the Board and found that FAB was not afforded a fair hearing, and that the findings of insolvency were not supported by the evidence.

Here is the case-by-case appellate history:

> (1) *State ex rel. Holloway v. FAB,* 186 N.W. 2d 573 (N.D.) 1971). The State Securities Commissioner and the State Examiner in 1970 began injunctive proceedings against FAB alleging bad practices in the conduct of its business. The case was remanded to District Court for further proceedings.
>
> (2) *State ex rel. Holloway v. FAB,* 197 N.W. 2d 14 (N.D. 1972). A second appeal

from a pre-trial order was made. Upon the remand, the trial court appointed a special master to examine FAB records. The State Examiner, after this action commenced, found FAB to be insolvent and such report was filed with an approval by the State Banking Board on June 28, 1971. FAB then asked to amend the pleadings to raise the issue of solvency. The trial court denied the request and the Supreme Court agreed.

(3) *FAB v. Ellwein*, 198 N.W. 2d 84 (N.D. 1972). The State Examiner issued two orders: 1. to have FAB relinquish all records, and 2. to in effect stop doing business or in the alternative show cause before the Board on July 1, 1971 why a receiver should not be appointed. The trial court found both orders void and the State Examiner then appealed. District Judge C. F. Kelsch, writing for this Court, said Order No. 1 was within the power of the State Examiner, acting for the Board. He then said, however, that FAB could obtain a hearing on both orders before the full Board, that is, an ex parte order of the State Examiner is subject to review by administrative hearing before the Board and the Board's decision is a subject of District Court appeal.

(4) *FAB v. Ellwein*, 474 F. 2d 933 (C.A. 1973). FAB sought injunctive relief against a hearing by the Board. The Eighth Circuit remanded the case back to Federal District Court to reflect abstention from action rather than a decision on the merits. The net effect was to leave open the question of a "fair hearing" and see how the state courts viewed it.

(5) *Securities & Exchange Commission v. FAB*, 481 F. 2d 673 (8 C.A. 1973). SEC sought an injunction against FAB. The Eighth Circuit did agree partly with the contentions made by SEC but we cannot see where the decision had a bearing on our issues.

There are three issues presented by this appeal:

1) Is the Board properly constituted and thus able to act?

2) Did FAB receive a fair hearing before the Board?

3) If so, was there sufficient evidence to sustain the findings of the Board declaring insolvency?

If the answer to either of the first two issues is in the negative, our work is ended because, obviously, it would then make no difference as to what the findings of the Board were. Numerous charges of conspiracy, wrongdoing and impropriety have been leveled at State officials, Board members and others. This writer and other judges questioned in oral argument how this Court could consider statements indicating a conspiracy to down FAB that were made outside of the record. We shall not repeat these charges, because to do so would be insulting, and, moreover, we are not going to deal with them in our decisional process. The trouble is, none of the charges are supported by the record we have before us. The evidence considered by the District Court and by this Court shall be confined to the record filed with the Court. 28-32-19, N.D.C.C. To consider unrebuttable charges would violate the fundamental concept of fair play and due process that FAB urges upon us.

The District Court has said that the makeup of the Board is "all wrong." FAB makes the point that bankers should not judge bankers. No matter how a chosen, a board rarely can be ideally constituted. Should we have no bankers on the board? There is no inherent reason why a banking board should not have bankers sitting just as a bar grievance committee has lawyers.

We do not think the statutory scheme of regulation is unconstitutional. Our laws seem to provide a sensible requirement for the appointment to the Board. 6-01-03, N.D.C.C. This statute was amended in 1969 to broaden membership on the Board to loan associations. The recent case of *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), upheld a contention that the Alabama Board of Optometry was unconstitutionally constituted and so did not provide an adequate administrative remedy. The Supreme Court agreed with the conclusion that the State Board was so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of a license to practice optometry. There were two sources of possible bias — prejudgment of the facts or personal interest in the outcome by the board members. The Supreme Court said that those with substantial pecuniary interests in legal proceedings should not adjudicate those disputes.

The logic of this holding applies with some force in our case. *Gibson, supra,* determined there was a serious question of personal financial stake in the matter in controversy because the board excluded from membership a large group of salaried optometrists and sought to enjoin them from practicing their profession. We think the pecuniary interest of our Board in this case is rather vague and certainly slight. It stretches the point to say that a Board member

from, say, Kindred, North Dakota, is going to be benefited by putting FAB out of business. The "interest" of the Board would arise from taking a prior position which, in the nature of things, is hard to reverse. We are, therefore, not saying, as did the trial judge, that the Board, as composed, is ipso facto unconstitutional because it has banker-members. We cannot say that the requirements for membership on the Board are irrational, or that they bear no reasonable relationship to the function of the Board, or that they exclude a segment of the banking community.

FAB argues that it really had no hearing on the merits and desperately wants one. At best this is a fragile argument for two reasons: They did indeed have a hearing and they did participate in it by extensive examination of witnesses. The fact that they made a "special appearance" and did not perhaps participate to the full extent available was a matter of their choice. The danger of abstention was a risk they knowingly undertook and even though it may not have changed the result they shall not now be heard to say they have had no hearing. The role of Mr. Saefke, FAB's attorney, was more in the nature of a general appearance. But see *Northern Pac. Ry. Co. v. McDonald*, 42 N.W. 2d 321 (N.D. 1950). The question of the type of appearance is not now important because the Board did have jurisdiction and, as shall be seen, it did conduct the hearing within due process guidelines.

Aside from their role, or non-role in the hearing, was it "fair"? FAB says, in a colorful display of verbiage, the hearing that was held was designed in the great tradition of the Old West to be a fair trial before the hanging. The Board had already been deeply embroiled in efforts to declare FAB insolvent. The State Examiner is chairman of that Board. These efforts

took the form of various legal actions in Federal and State courts as previously referred to. It is apparent that counsel for the Board took an active part in cooperating and exchanging information with the SEC, which, in turn, presumably resulted in their entry into the fray. After these efforts were unsuccessful they turned to an administrative hearing. The State Examiner had, to some extent, determined the condition of the Bank by the issuance of his prior orders. Mr. Frank F. Jestrab, as attorney for the Board, filed a Complaint against FAB. He represented the Board in all the litigation. The Board approved the report of insolvency by its examiner *prior to the hearing.* This is not to say the findings are incorrect. The correctness of the findings does not make the hearing fair. Due process of law presupposes a fair and impartial hearing before a fair and impartial tribunal. The board hearing the case should be a qualified board without prejudice and strictly impartial as to the issues to be tried. *Smith v. Department of Registration, Etc.*, 412 Ill. 332, 106 N.E. 2d 722 (1952); see, *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). As a general proposition of law we accept the preceding sentence, but the circumstances of our case require the consideration of other factors, and we do not think our decision violates that proposition.

It is unfortunate in light of the powers and duties placed upon the State Examiner that he is also required to act as chairman of the State Banking Board, which is the board which must ultimately decide what action is proper with regard to all complaints, reports and recommendations made by this same Examiner. We invite the attention of the Legislature to this structural weakness. The involvement of the State Examiner is more than ministerial. Where investigation, prosecution and decision rest with the same body, its members should be zealous in the recognition and preservation of the

right to a hearing by impartial triers of the fact. We suggest that it has the appearance, if not the substance of partiality, to allow the Examiner to sit in judgment at these hearings. To perform its high function in the best way, justice must satisfy the appearance of justice. *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954). We realize that for now the State Examiner could not step down without abrogating a statutory command. The Examiner is, at once, accuser and judge.

In discussing the make-up of the Board itself, we note that many administrative agencies such as the Banking Board are charged by statute with a tripartite responsibility of performing investigative, accusative, and adjudicative functions.

The mere fact that all three functions are combined in one board is not in itself a denial of due process. *Pangburn v. Civil Aeronautics Board,* 311 F. 2d 349 (1st Cir. 1962), at page 356; *Griggs v. Board of Trustees,* 61 Cal. 2d 93, 37 Cal. Rptr. 194, 389 P. 2d 722 (1964); *Fireman's and 'policeman's Civil Service Commission v. Hamman,* 404 S.W. 2d 308 (Tex. 1966); and *Borman v. Tschida,* 171 N.W. 2d 757 at 764 (N.D. 1969). However, as stated in footnote No. 17 in *Gibson v. Berryhill, supra,*

> "The extent to which an administrative agency may investigate and act upon material facts of a case and then consistent with due process, sit as an adjudicative body to determine those facts finally has occasioned some divergence of views among federal courts . . ."

While it may be well established that such combination of functions in administrative agencies or boards does not per se violate due process, we must

carefully scrutinize the facts in this case to determine if due process has been violated.

What constitutes due process within an administrative proceeding? While recognizing that the adjudicative function of the Board is quasi-judicial in nature, we have never held that the minimal due process that must be afforded participants before an administrative board or agency is synonymous with minimal requirements of due process in a court of law. To do so would be to create a second judicial branch without statutory authority and add to time required in disposition of administrative decisions.

> "(5) The board is not a judicial tribunal, and due process does not require a judicial trial, and the character of the hearing is not measured by standards of judicial procedure." 83 F. 2d 351 at 356.

In *In re Township 143 North, Range 55 West, Cass County,* 183 N.W. 2d 520 (N.D. 1971), an appeal from the State Board of Public School Education, an administrative board, wherein we considered the question of what constitutes an unfair, arbitrary, or discriminatory hearing before an administrative board, we concluded that there must be an absence of one of the elements deemed essential to due process of law without specifically enumerating what those essential elements are.

> "To constitute an unfair, arbitrary or discriminatory hearing before an administrative agency, the defect or practice complained of must be such as might lead to a denial of justice or there must be an absence of one of the elements deemed essential to due process of law. An examination of the record on this appeal shows equal op-

portunity to present evidence, and that such evidence and applicable statutes to have been carefully considered by the administrative agency.

"Upon appeal to the Supreme Court from a judgment of the district court, entered on appeal from the decision of an administrative agency, the scope of appeal is limited. The decision of the agency must be affirmed unless the court finds that the decision of the agency is not in accordance with law, or that it is a violation of the constitutional rights of the appellant, or that any of the provisions of the Administrative Agencies Practice Act have not been complied with in the proceedings before the agency, or that the rules of procedure of the agency have not afforded the appellant a fair hearing, or that the findings of fact made by the agency are not supported by the evidence or that the conclusions and decision of the agency are not supported by its findings of fact. Section 28-32-18, N.D.C.C.; *Application of Northern States Power Company, 171 N.W. 2d* 751 (N.D. (1969); *In re Superior Service Company,* 94 N.W. 2d 84 (N.D. 1958)." *In re Township 143 North, Range 55 West, Cass County, supra,* 183 N.W. 2d 520 at 534.

Here, the statute does not provide for the disqualification and temporary replacement of board members or for a substitute tribunal. When challenged, must a board member or the entire board refuse to act, leaving no substitute board and providing no forum for a hearing on the alleged violations of law? The courts have treated this question as presenting a comparison of wrongs or a choice of two evils. When confronted with this

problem, the courts have relied upon the so-called "Rule of Necessity" to require otherwise disqualified officers to serve when no provision has been made for a substitute tribunal.

In reviewing the challenged lack of due process at the administrative hearing, due to bias, we begin with the presumption that the Board regularly performed its duty and accordingly afforded FAB and the depositors due process at the administrative hearing by refusing to allow any possible previous bias or prejudgment to interfere with its decision based upon evidence presented at the hearing.

> "31-11-03. Disputable presumptions. — All presumptions other than those set forth in section 31-11-02 are satisfactory if uncontradicted. They are denominated disputable presumptions and may be contradicted by other evidence. The following are of 'that kind:
>
> ***
>
> "15. That official duty has been performed regularly;" N.D.C.C.

Nevertheless, the Bank asserts it was denied a fair hearing in a multitude of ways. Rather than attempt to recite all the publicity and harassment that the Bank asserts prejudiced it, we refer to the prior litigation. It is our view that the facts, the statutes, and our prior decision left the Board with no alternative other than conducting a hearing to determine the issue of insolvency. See, *FAB v. Ellwein, supra.* It would be anomalous, if not ridiculous, for this court to advise an administrative hearing and then tag the hearing with being void after it is held, unless there was an intervening circumstance, which we do not find.

The Rule of Necessity was early recognized by the United States Supreme Court in *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519 (1920). The case is no longer followed on the constitutional question of taxation decided therein, but it remains a useful and reliable guide in deciding cases which may call for the applicability of the Rule of Necessity. In *Evans*, a United States District Judge for the Western District of Kentucky as plaintiff sought a refund for taxes paid under protest. The question the Supreme Court was faced with was whether under the Constitution Congress has the power to tax the compensation of Federal Judges. In support of the Rule of Necessity, the court said:

> "Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course, the Government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only course open to us is to consider and decide the cause — a conclusion supported by precedents reaching back many years. Moreoever, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality and both

> contemplated and intended that the question should be settled by us in a case like this." *Evans v. Gore, supra,* 253 U.S. 245 at 247, 248.

Even thou the judges were directly interested in the outcome, they were not disqualified, for the reason that no other tribunal existed to hear the issue.

The Rule of Necessity is not confined to judicial proceedings, but is equally applicable to State administrative proceedings. In *Brinkley v. Hassig, supra,* Dr. Brinkley alleged that the revocation proceedings should be set aside because the medical board members were prejudiced against him and had been active in the bringing of the charges against him. The court agreed that in all probability all the board members were in fact prejudiced, but it refused to set aside the action of the board.

The Tenth Circuit Court of Appeals stated:

> "If an administrative tribunal may on its own initiative investigate, file a complaint, and then try the charge so preferred, due process is not denied here because one or more members of the board aided in the investigation." *Brinkley v. Hassig, supra,* 83 F. 2d 351 at 357.

The court concluded:

> "Assuming such preconceived prejudice, what is the answer? The statute provides but one tribunal with power to revoke a doctor's license, just as the Supreme Court of Kansas is the only body with power to disbar a lawyer. If such powers may not be exercised if the members of the board or court are

prejudiced, then any lawyer or doctor who commits an offense so grave that it shocks every right-thinking person, has an irrevocable license to practice his profession if he can get the news of his offense to the court or board before the trial begins. That will not do. The commendable efforts of the medical and legal professions to raise the standards of their professions by cleaning their own houses cannot be set at naught by any such rule of law.

"From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal." *Brinkley v. Hassig, supra,* 83 F. 2d 351 at 357.

In *The Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), it was expressly noted that in administrative proceedings, substitute tribunals rarely exist and that generalized attitudes in advance of a hearing are not necessarily regarded as constituting a disqualifying bias. The Cement Institute was a trade association whose members had been accused of restraining competition by agreeing to use a multiple-basing point system of pricing. The hearing lasted for over three years, producing 49,000 pages of oral testimony and 50,000 pages of exhibits. Before any decision was an-

nounced, the Commission was asked to disqualify itself on the basis of prejudgment, bias, and prejudice, because of reports the Commission had made to Congress, the President, and to various congressional committees, which evidenced the opinion that a multiple-basing point system was a price-fixing device which violated the Sherman Anti-Trust Act. Although the court assumed such opinions were formed because of prior official investigations, the court held that these generalized attitudes did not disqualify the Commission.

> "In the first place, the fact that the Commission had entertained such views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.
>
> "Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has

provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are 'unfair,' from any cease and desist order by the Commission or any other governmental agency.

"There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. * * *" *Federal Trade Com. v. Cement Institute, supra,* 92 L.Ed. 1010 at 1034, 1035.

Regarding the argument of a claimed denial of due process, the court said:

"Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of 'law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions

in this respect than a court." *Federal Trade Com. v. Cement Institute, supra,* 92 L.Ed. 1010 at 1035.

There are instances when the Rule of Necessity does not apply. E.g., *State ex rel, Miller v. Aldridge,* 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470 (1925). Lack of due process, reaching constitutional gravity, does not yield to any "Rule of Necessity". The Rule of Necessity and the question of due process are really dissimilar concepts and should not be confused. A suspect person's sitting on a board does not, of itself, render the whole proceeding void for lack of due process. In this case, we are saying there is adequate due process and therefore the Rule of Necessity must prevail.

We earlier stated that the minimal due process that must be afforded participants before an administrative board is not synonymous with the minimal requirement of due process in a court of law. The fundamental requirement of due process is the opportunity to be heard. *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). As the final body entrusted with the responsibility of making our Constitution a living force against heavy-handed administrative decision, we have proceeded in this case with great caution. Our trust must be in the integrity of legally constituted boards to act upon the evidence alone. Judicial review of those actions is the ultimate due process protection accorded those aggrieved. We can find no evidence that taints the hearing itself and as we have already said, we cannot consider extra-record allegations. Let us now review the results of that hearing.

There is no need to further burden this opinion with an itemization of all the indicia of insolvency, fraud, and mismanagement. To do so would run the opinion

into a hundred pages. We ask not so much whether we will reach the same decision on the same grounds as did the Board, but rather, was the decision arrived at properly and is it supported by substantial evidence? Both sides have accused the other of juggling figures. Witnesses, with varying portions of expertise, all testified that in their opinion the assets of FAB were insufficient to pay its liabilities. This Court has no power to substitute its own opinion for the judgment of qualified experts in matters entrusted to administrative agencies. See, *FAB v. Ellwein, supra,* at 106, with numerous other citations there referenced. The Examiner and his deputies have all had accounting training (most are Certified Public Accountants) and the Examiner, by statute, has the discretion to determine whether the particular instances of accounting practices conform to the law and sound banking usage. FAB's President, Mr. Hart, said he believed FAB's assets were sufficient to pay its liabilities. Leaving aside the question of Mr. Hart's qualifications to so testify, we are unconvinced that his testimony is acceptable on that score. While we do not accuse FAB of any creative accounting, we simply cannot accept such an opinion on the face of such overwhelming evidence to the contrary.

Let us detail some of the significant items of insolvency:

> 1. FAB had from 1963 to 1969 a net operating loss of $227,118.80; a loss of $16,270.36 in 1970 and $152,031.31 in 1971; as of December 31, 1971 the capital account was exhausted and there was a deficit of $42,870.47.
>
> 2. Contrary to generally acceptable principles of accounting, FAB consistently entered as earnings the gross amount to be

received during the full term of a property lease in the year the lease was executed. Thus, the effect was overstating the income in the year the lease was executed.

3. "Capital Notes" sold were not approved by the State Examiner as required by law and they were sold to trust of which FAB itself was trustee — a curious piece of self-dealing seemingly contrary to 6-05-15, N.D.C.C., and well recognized standards for the investment of trust funds. These notes were subordinate to the claim of depositors but this was not fully disclosed to the buyers. Subsequently, the note holders were informed of an opportunity to convert to a higher interest rate certificate but were not told they had to actually "borrow" the money by signing a note. (A note for their own money! The Mad Hatter would have liked this plan.)

4. There were suspect financial dealings between Mr. Hart and New Prince Hotel which was owned by him. Also, such dealings took place between FAB and Standard Investment Company, another Hart family enterprise. Standard showed a net profit of $15.49 in 1970. Yet an unsecured loan of $65,000.00 was made to it. Incidentally, nearly 20 percent of all loans and leases were made without adequate security to Mr. Hart or his family enterprises.

5. Bismarck Investment Corporation, owned by Hart, had no operating statement but received a $54,000.00 loan which was classified by FAB as a loss.

6. A loan was made to Hart's son and his

corporation although the income sources of the corporation were, if not non-existent, nebulous.

7. An unsecured loan was made to Mr. Campbell, a vice-president of FAB for $12,129.98 *when he was bankrupt.* He then borrowed $19,500.00 from FAB at a later date to repay a loan made to him by Mr. Hart.

While our primary concern throughout the examination of the record has been with the question of insolvency, we must make a concluding comment about the overall operation of this banking institution. We believe that the powers and duties of the State Banking Board as defined in 6-01-04, N.D.C.C., allow for the enforcement of such orders as in its judgment may be necessary or proper to protect the public and the depositors of a financial institution. Continued operating losses, confusing and ridiculous letter exchanges between officers, unacceptable accounting practices to overstate income, excessive self-dealing between officers and their families, misleading, if not false, advertising on insurability of deposits, all lead to complete justification by the Board in closing down this operation. We have no evidence that the Board acted from malice, self-interest or any other improper motive. Our review, limited to the record, indicates there is substantial evidence to support the findings of fact made by the Banking Board. *Suedel v. North Dakota Workmen's Compensation Bureau,* 218 N.W.2d 164 (N.D. 1974); *In re Township 143 North, Range 55 West, Cass County, supra; Williams Electric v. Montana-Dakota Utilities Co.,* 79 N.W.2d 508 (N.D. 1956). Accordingly, the order of the Board appointing a receiver to liquidate the bank is affirmed and the judgment of the District Court is reversed, and the District Court is

directed to enter judgment on remand affirming the order of the State Banking Board.

/s/ James H. O'Keefe, D.J.
/s/ (Illegible)
/s/ Ralph J. Erickstad, C.J.

Associate Justices Harvey B. Knudson, Wm. L. Paulson and Robert Vogel deeming themselves disqualified did not participate; the Honorable C. F. Kelsch and the Honorable Emil A. Giese, District Judges of the Sixth Judicial District and the Honorable James H. O'Keefe, District Judge of the Second Judicial District, sitting in place of the disqualified justices.

Civil No. 8967

First American Bank & Trust Company

v.

Ellwein

Giese, D. J. (concurring specially)

I concur in Judge Kelsch's concurrence, with the understanding that paragraph numbered 3, page 4, is intended to mean that the Board would render an opinion relative to complaints initiated and findings made by the State Examiner, only after due hearing on the merits.

/s/ Emil A. Giese D. J.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

First American Bank & Trust Company, a domestic corporation, Robert M. Hart, Robert N. Campbell, Larry Sanders, Harvey W. Boen, Albert W. Fetzer, Ruth M. Hart, Bernard H. Hillyer, Arne J. Springan, John F. Sullivan, Charles L. Welch,

Appellees,

-vs-

G. W. Ellwein, State Examiner and Commissioner, Department of Banking and Financial Institutions; the State Banking Board and Victor Abraham, Bank Examiner, all of the State of North Dakota,

Appellants.

Civil No. 8967

C. F. KELSCH, DISTRICT JUDGE, CONCURRING SPECIALLY

I concur in the opinion of the court, with one important exception. I do not agree with the inference or implied conclusion that the State Banking Board, as now established under our statute, constitutes a fair and impartial administrative tribunal before which any financial institution under its jurisdiction can have a fair and impartial hearing; from which I dissent and desire to state my reasons therefor.

It is well settled in this state:

(1) That where the constitutionality of a statute

depends upon the power of the legislature to enact it, its validity must be tested by what might be done under color of the law and not what has been done.

Herr v Rudolf, N.D. 25 N.W.2d 916

(2) That this court has no power to declare any legislative enactment or law of this State unconstitutional, unless at least four of the Judges decide that its invalidity is clear beyond a reasonable doubt.

Section 89 of the State Constitution;

State ex rel Mason v. Baker, 69 N.D. 488, 288 N.W. 202

An analysis of our banking laws, in so far as they relate to a determination of the insolvency of any financial institution under its jurisdiction, discloses that they not only authorize but expressly requre:

(1) That the state examiner, while acting in a purely administrative capacity, must find and determine whether the financial institution which he has examined is, in fact, insolvent;

(2) That the State Banking Board, while acting in a purely administrative capacity, must approve or disapprove the examiner's findings that the bank which he has examined is, in fact, insolvent; and

(3) That the state examiner and the State Banking Board, while acting in a quasi-judicial capacity, must sit in judgment to review and pass upon the necessity, reasonableness or validity of its prior decision that the financial institution involved was, in fact, insolvent.

I am firmly convinced:

(1) That the legislative scheme which unites investigative authority, accusatory and adjudicatory functions, in one administrative agency is unsound in principle, unwise in public policy, inconsistent with common experience and violtive of the fundamental requirement of due process of law, as established by the recent decisions of the Supreme Court of the United States.

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942;

Kinsella v United States, 361 U.S. 234, 80 S. Ct. 297, 4 L.Ed.2d 268;

Goldberg v Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287;

Morrisey v Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 484;

Gibson v Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488

(2) That where the state examiner and the other members of the State Banking Board are required by statute, while acting in a purely administrative capacity, to determine whether the financial institution in issue is, in fact, insolvent, that in such case it is reasonable to find and conclude that each member has a vital, personal interest in the outcome of the proceeding before the board, while it is acting in a quasi-judicial capacity; and consequently it is unreasonable and inconsistent with common experience to believe and to find that any member would admit that he made a mistake, that he acted arbitrarily or in bad faith in breach of his official duties. On the contrary, their self-interest would actuate and persuade them to use and exercise all of the power and

influence of their official position to defend and justify their prior decision that the bank in issue was, in fact, insolvent.

(3) That where the members of an administrative agency are required to prejudge the issue which they are to try upon the merits, they cannot, by reason of their bias and prejudice, act as independent or impartial decision makers;

Goldberg and Morrisey, supra

That such legislative policy is, in my judgment, not only repugnant to and inconsistent with but also offends the principle of fundamental fairness essential to constitute due process of law.

Kinsella, supra

While courts have no power to legislate by judicial fiat, (Shermoen v Lindsey, N.D. 163 N.W.2d 738) I firmly believe I have the right and the explicit duty to recommend the enactment of timely, remedial legislation, so as to provide, in effect:

(1) That the state examiner be removed as a member and chairman of the State Banking Board, so that he will have no authority to act in a quasi-judicial capacity.

(2) That the State Banking Board be relieved and absolved from the duty and responsibility of approving or disapproving the state examiner's findings that any bank under its jurisdiction, which he has examined, is insolvent, while acting in a purely administrative capacity, so that the board will not have to sit in judgment of and be required to pass upon the necessity, reasonableness or validity of its prior decision by approving the state examiner's report.

(3) That the board should not only have the right but the clear legal duty to review the state examiner's findings of insolvency and to either approve or reject the same, if the clear weight of the evidence before it justifies such a determination.

I firmly believe that the enactment of such remedial legislation:

(1) Would remove the serious doubt, which now exists, as to the constitutional validity of our statues; and whether the State Banking Board, as now established, constitutes a fair and impartial administrative tribunal before which a fair and impartial hearing can be had by any financial institution under its jurisdiction;

(2) Would protect every financial institution in this State from the unreaonable, arbitrary or oppressive action of the state examiner;

(3) Would protect both the public and private interests in the financial institutions of this State in case of an emergency;

(4) Would protect and safeguard the right of all financial institutions in this State to the constitutional guarantee of due process of law; and

(5) Would put an end to the protracted, highly expensive, needless and unjust litigation that has been before this court in this controversy between these parties; and thereby make a substantial contribution to the improvement of administrative justice in this State.

/s/ C. F. Kelsch
C. F. Kelsch, District Judge

STATE OF NORTH DAKOTA
Supreme Court
Bismarck

Clerk of the Supreme Court
Mrs. Luella Dunn

August 1, 1974

Frank F. Jestrab and
John R. Gordon
Special Assistant Attorneys General
Box 1526
Williston, North Dakota 58801

No. 8967 FIRST AMERICAN BANK v. ELLWEIN, ET AL.

The Court has today entered an order denying the petition for rehearing in this case. However, the Honorable Emil A. Giese would have granted the rehearing.

In accordance with Rule 41 (a) of the North Dakota Rules of Appellate Procedure, the mandate of the Supreme Court will be issued after the expiration of seven days.

Sincerely yours,
/s/Luella Dunn
Luella Dunn
Clerk

LD:je
cc: Frederick E. Saefke, Jr.
Lundberg & Nodland
The Honorable M.C. Fredricks
The Honorable Ralph J. Erickstad

Supreme Court, U. S.
FILED
DEC 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Civil No. 75-742

FIRST AMERICAN BANK & TRUST COMPANY, a Domestic Corporation, ROBERT M. HART, ROBERT N. CAMPBELL, LARRY SANDERS, HARVEY W. BOEN, ALBERT W. FETZER, RUTH M. HART, BERNARD H. HILLYER, ARNE J. SPRINGAN, JOHN F. SULLIVAN, CHARLES L. WELCH,
Petitioners,

vs.

G. W. ELLWEIN, State Examiner and Commissioner, Department of Banking and Financial Institutions; THE STATE BANKING BOARD and VICTOR ABRAHAM, Bank Examiner, All of the State of North Dakota,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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Civil No. 75-742

FIRST AMERICAN BANK & TRUST COMPANY, a Domestic Corporation, ROBERT M. HART, ROBERT N. CAMPBELL, LARRY SANDERS, HARVEY W. BOEN, ALBERT W. FETZER, RUTH M. HART, BERNARD H. HILLYER, ARNE J. SPRINGAN, JOHN F. SULLIVAN, CHARLES L. WELCH,
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Did petitioners, freely and without reservation, submit to and litigate in the North Dakota state courts the federal constitutional questions which they now seek to litigate before the Three-Judge United States District Court?

STATUTORY PROVISIONS INVOLVED

28 United States Code Section 2281

28 U.S.C. Sec. 2281—Injunction against enforcement of State Statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

28 United States Code Section 2284

28 U.S.C. Sec. 2284—Three-judge district court; composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before the final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in each State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201.

STATEMENT OF THE CASE

This is an action commenced by the plaintiffs by the filing of the Complaint in the office of the Clerk on January 17, 1975. Plaintiffs requested that a Three-Judge District Court be convened and that the defendants, "their employees, agents, successors and others acting in concert with them," be preliminarily and permanently enjoined from enforcing any actions taken by them pursuant to the statutory scheme of North Dakota and for a declaration that Sections 6-01-01, 6-01-03, and 6-01-09 North Dakota Century Code are unconstitutional, or in the alternative that the exercise of authority by the defendants pursuant to the statutes was unconstitutional. At the same time, the plaintiffs applied for a Temporary Restraining Order against the defendants. On the 17th day of January, 1975, in the District Court, the Honorable Bruce Van Sickle granted the Temporary Restraining Order. This order was granted ex parte and no return day was fixed. On the 21st day of January, the defendants served the adverse parties with a Notice of Motion to Dissolve the Temporary Restraining Order and set the same for hearing on January 24, 1975, in the United States Courthouse in Bismarck, North Dakota. Following the hearing, defendants' application was denied by the single District Judge under date

of January 27, 1975, and the defendants thereupon appealed to the court of appeals. The court of appeals set aside the Order of the District Court issued on the 27th day of January, 1975, and set the Motion to Dismiss and to Dissolve the Temporary Restraining Order for hearing before a Three-Judge Court as soon as possible. This order was dated February 6, 1975.

Thereafter, the defendants filed another Motion to Dismiss and the Motions came on for hearing before the Three-Judge Court in the United States Courthouse in Fargo, North Dakota, on February 20, 1975. Thereafter, the Three-Judge Court filed a Memorandum and Order of Dismissal dated February 27, 1975, filed March 4, 1975. The court held that all of the constitutional issues presented by the record in the case sub judice had been litigated in the state courts and thus there was no substantial federal constitutional question presented for the determination by the Three-Judge Court, ergo the Three-Judge Court had no jurisdiction. (A 1-12) Upon this Memorandum and Order a Judgment of Dismissal was signed by Judge Van Sickle on March 6, 1975, (A 11-12) and on the same day filed in the office of the Clerk of the District Court.

The plaintiffs thereafter filed a Notice of Appeal to the Supreme Court of the United States and with the Notice filed an Application for a Temporary Restraining Order. This Notice of Appeal was later withdrawn. By Notice dated the 25th day of March, 1975, the plaintiffs filed a Notice of Appeal to the court of appeals. (A 19) An Application was made for a Stay Pending Appeal. The Application for Stay was denied. The court of appeals affirmed. Its opinion was filed July 30, 1975. (A 14)

The First American Bank & Trust Company and other petitioners seek a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

REASONS WRIT SHOULD BE DENIED

In the abstention case, *First American Bank & Trust Company, et al., Plaintiffs-Appellants v. G. W. Ellwein, et al.*, 474 F. 2d 933 (8th Cir., 1973), the plaintiffs-petitioners alleged in their complaint that they were denied due process of law in the state court proceedings, and hence were entitled to relief in the federal courts. The Court of Appeals of the Eighth Circuit by opinion filed February 27, 1973, affirmed the decision of the district court invoking abstention and noted: (*First American Bank & Trust Company v. Ellwein*, 474 F. 2d 933 at 935 (8th Cir., 1974))

> "The matters presented to the federal court are now in the state courts, and their determination of the 'fairness of hearing' issue may well eliminate the need for any consideration of constitutional issues by the federal judiciary."[4]
>
> "[4] At oral argument the parties conceded that the question of competency of the Board and its right to proceed under the circumstances has been preserved in the record of the administrative hearing and can be presented to the North Dakota courts."

On June 28, 1974 the North Dakota Supreme Court finally decided the state case on the merits adverse the petitioners. *First American Bank & Trust Company v. Ellwein*, 221 NW 2d 509 (ND 1974), Petitioners petitioned for Writ of Certiorari to the Supreme Court of North Dakota. In that petition it was recited (A 17-18):

> "Constitutional and due process questions (were) first raised in written response to Complaint of State Banking Board and its Notice of Hearing . . .; secondly, in opening statement at time of purported 'hearing', June 19, 1972 . . .; thirdly, on appeal to the State District Court . . .; and lastly to State Supreme Court in Petitioners' (Appel-

lees) Brief and Petition for Rehearing . . . (petition for Writ of Certiorari at 14, *First American Bank & Trust Company v. Ellwein*, No. 74-187 (U.S.S.Ct.))1."

The petition was denied.

CONCLUSION

The petitioners, freely and without reservation, litigated federal constitutional questions in the state courts. The record is clear. In the abstention case in the court of appeals, the petitioners conceded that the federal constitutional questions had been preserved in the record in the state courts to be presented to the North Dakota state courts. After an adverse decision in the state courts and in its previous petition to this court, it was conceded, indeed, asserted, that the constitutional questions had been litigated in all stages of the proceedings in the North Dakota courts.

The writ should be denied. *England et al. v. Louisiana Board of Medical Examiners*, 475 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (January 1964).

Dated this 10th day of December, 1975.

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